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"LAND IS ITSELF A SACRED, LIVING BEING": NATIVE AMERICAN SACRED SITE PROTECTION ON FEDERAL PUBLIC LANDS AMIDST THE SHADOWS OF *BEAR LODGE*

*Joel Brady**

Author's Note

This article was originally written in December 1998. In the interim, the Tenth Circuit Court of Appeals has ruled on the appeal filed by the Mountain States Legal Foundation, on behalf of the Bear Lodge Multiple Use Association. In the opinion, filed on April 26, 1999, the Tenth Circuit held that the climbers who originally filed suit lacked standing. Specifically, the Court stated: "Because they have alleged no injury as a result of their claim the FMCP improperly establishes religion, we hold the Climbers have no standing to sue in this case."[1]

Moreover, the Court, in disposing of the case on grounds of standing, avoided addressing the constitutional issues that this article addresses:

> Therefore, we do not reach either Climbers' argument the FCMP establishes religion or the Secretary's response that the plan was designed, in part, to eliminate barriers to American Indians' free practice of religion and such accommodation is appropriate in situations like this where the impediments arise because the sacred place of worship is found on property of the United States.[2]

As such, this most recent *Bear Lodge* decision appears to render the case ripe for a potential Supreme Court grant of certiorari, should another appeal follow. Given the considerable lack of Supreme Court guidance directly addressing the issue of sacred site protection on federal public lands, it would appear that *Bear Lodge* would avail the Court a unique opportunity to delineate precisely how the religion clauses of the First Amendment should decide the issues raised by this case. It is this article's contention that the time-honored affirmative mandate of accommodation of religion can by fully honored in this case, while at the same time remaining well within the permissible bounds of the Court's Establishment Clause jurisprudence.

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1. Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 822 (10th Cir. 1999).
2. *Id.*

I. Introduction

> *Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being.*[3]

This excerpt from Justice Brennan's dissenting opinion in *Lyng v. Northwest Indian Cemetery Protective Ass'n*[4] underscores the centrality of sacred land to the spiritual lives of Native Americans. Yet, Justice Brennan's words are clearly in the minority. He alone takes the time to scrutinize the particular Native American faith at issue in an attempt to ascertain its relevance, both to the case at bar, as well as to the lives of practicing Native Americans everywhere. His words and sentiments reflect an awareness of the considerable differences between Native American spirituality and Western religious thought, and the impact those differences should have on our legal system. Moreover, his words express the cyclical and all-encompassing nature of Native American spirituality, recognizing that areas of life considered fundamentally separate and distinct in Western religions are an all-encompassing amalgam in the Native American vision: "Thus, for most Native Americans, '[t]he area of worship cannot be delineated from social, political, cultur[al], and other areas o[f] Indian lifestyle.'"[5]

At the center of most Native American belief systems is the basic tenet that religion and faith draws heavily upon sacred lands. Land *is*, as Justice Brennan notes, a living being. As such, courts would do well to heed Justice Brennan's delineation of the paramount importance of sacred land to every aspect of Native American life, not just religion. The pervasiveness of spirituality has fueled many Native Americans to be increasingly assertive in exercising their sovereignty. Specifically, they are "demanding that agencies such as the Park Service treat them like living cultures, not dead ones."[6] Once the federal government grasps the idea that Native American land is part of the rich tapestry that binds tribal members together as well as an actual, living being in the minds of Native Americans. The relief sought by sacred site protection advocates may finally be realized.

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3. Lyng v. Northwest Indian Cemetery Protection Ass'n, 485 U.S. 439, 460-61 (1988) (Brennan, J., dissenting).

4. 485 U.S. 439 (1988).

5. *Id.* at 459-60.

6. Chris Smith & Elizabeth Manning, *The Sacred and the Profane Collide in the West*, HIGH COUNTRY NEWS, May 26, 1997 (vol. 29, no. 10) (available at <http://www.hcn.org/1997/may26/dir/Feature_The_sacred.html>).

In considering the law regarding Native American sacred site protection on public lands, in terms of the applicability of the First Amendment's Establishment Clause, courts and scholars should be vigilant in recalling the Framers' intent behind the Establishment Clause. The Framers intended the Establishment Clause to "guarantee a separation of church and state that would prevent the persecution of religious minorities."[7] At the same time, the separation of church and state was intended to encourage "a vibrant, but private sphere of religiously-motivated activity."[8] As Native Americans have suffered tremendous blows to their way of life over the course of United States' history, Native Americans are owed the respect which the Framers intended under the Establishment Clause. Justice Brennan's words in his dissent in *Lyng* speak admirably to this issue. Those in a position to enhance protection of Native American sacred sites should heed those words.

This comment attempts to address some of the key issues raised when considering Native American sacred site protection on federal public lands. This comment illustrates the ongoing litigation concerning land in northeast Wyoming known to Lakota, Dakota, and Nakota Sioux as "Mateo Tepee," or "Mato Tipila," which means "Bear Lodge" or "Bear's Lodge." To most of the Western world, this area is known as Devil's Tower. After a brief comparison of some of the basic tenets of Native American and Christian belief systems, the analysis turns to applicable First Amendment Free Exercise and Establishment Clause jurisprudence. From the basis of the Establishment Clause, the comment addresses the issues at play in *Bear Lodge*, examining how Establishment Clause jurisprudence has determined and continues to determine the federal approach to sacred site protection. Finally, the comment focuses upon the current situation involving a sacred Native American site on federal public land — Rainbow Bridge, in Utah. This, along with many other situations, is a context in which federal public land managers are attempting to lay the policy groundwork for the future, while at the same time trying to comport with a vague area of the law.

No Supreme Court case law exists which directly addresses the applicability of the Establishment Clause to sacred site protection. Also, the Establishment Clause is the chief barrier to the passage of a general sacred lands statute. These two factors taken together seem to result in a "Catch-22" for sacred site protection advocates. The concluding section of this comment addresses the future of sacred site protection in terms of accommodation and the federal-tribal trust relationship, as well analyze how the *Bear Lodge* and Rainbow Bridge cases are constitutional examples of successful compliance with the affirmative mandate of accommodation of Native American religion.

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7. Raymond Cross & Elizabeth Brenneman, *Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century*, 18 PUB. LAND & RESOURCES L. REV. 5, 37 (1997).

8. *Id.*

II. A Context for Sacred Site Protection

What precise roles do sacred sites serve in the Native American way of life? Sacred sites are conduits through which Native Americans are able to channel the physical and spiritual manifestations of their beliefs. This sacred connection runs the risk of federal regulation when a specific sacred site is located on federal public land:

> These sacred lands can be the places where traditional ceremonies or other important rituals occur, or where spiritual power emanates. Sacred lands are found within areas now designated as national parks and monuments, national forests, and on other public lands managed by federal agencies. Unfortunately, agency decisions authorizing the use or development of public lands can harm, or even destroy the attributes that make such lands sacred, and in so doing, diminish the ability of Indians to practice their religions.[9]

Because of the inherent tension between the Free Exercise Clause and the Establishment Clause, as well as that between the Establishment Clause and the policy of accommodation, the degree of protection which Native American sacred sites on federal land will receive in any given situation is unclear. In the wake of such uncertainty, many Native American advocates have urged for stronger, more clearly articulated standards. As a result, the Establishment Clause presents a formidable hurdle for any truly effective sacred site legislation.

Some commentators urge that Native American sacred site protection, irrespective of the Establishment Clause, has been extremely hard to come by for two distinct reasons:

> First, commentators have cited the United States' perceived sense of cultural inferiority to their European cousins as deterring any concerted legislative action to preserve our young nation's historic and cultural heritage from destruction. . . .
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> . . . .
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> Second, the Americans of that era did not generally value contemporary Native American ceremonial practices and traditions as cultural resources that were worth preserving as an irreplaceable part of our shared natural heritage.[10]

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9. Lydia T. Grimm, *Sacred Lands and the Establishment Clause: Indian Religious Practices on Federal Lands*, 12 NAT. RESOURCES & ENV'T 19, 19 (1997).

10. Cross & Brenneman, *supra* note 7, at 11-12, 13.

As a result of these realities, those in positions to influence and promulgate sacred site protection legislation have been extremely reluctant to do so. One federal agency, the National Park Service, has been entrusted with protecting federal public land, a job which requires a delicate balancing of the competing interests of recreation and preservation.[11]

Given these long-standing difficulties in preserving and protecting sacred sites, it is essential to grasp the difficulties a federal land manager faces when he or she attempts to regulate the use of federal public lands. An appropriate balance between recreation and preservation must be established. Similarly, in the case of Native American sacred sites, a balance between the Free Exercise Clause and the Establishment Clause must be struck. Considering the government's traditional lack of zeal in protecting sacred sites, coupled with the ambiguities of First Amendment jurisprudence, the federal land manager's job is an unenviable one. In spite of this difficulty, our federal decisional law mandates accommodation of religion.[12]

III. Native American and Christian Faiths: A Brief Comparison

An examination of the basic underpinnings of both Native American and Western, Christian faiths is essential to the understanding of the basic issues involved in sacred site protection. Such theoretical bases underscore the history of our courts' treatment of the issue of sacred site protection to markedly different degrees.

Inherent in any thorough analysis of Native American law is a fundamental understanding of the many roles which religion plays in the Native American way of life. Rather than impacting a discrete sphere, religion encompasses all aspects of a Native American's being. It is arguably the truest expression of a Native American's culture and heritage. Moreover, it is of particular relevance when analyzing the legal system's impact on Native American cultures.

It is important to understand at the outset that there is no "one" Native American religion, given the multitude of tribes in existence. There is a wide variance in specific types of Native American religious beliefs.[13] Also, the perspective from which Native Americans view religion is diametrically opposed to that of Western Christian faiths: "Native Americans typically view religion more in terms of culture than in terms of what most Americans consider religion. Notably, no traditional Native American language has one word that could translate to 'religion.' For Native Americans, the spiritual life is not separate from the secular life."[14] Anyone involved in Native American

11. *Id.* at 19.

12. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984).

13. Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1295 (1996).

14. *Id.*

law must remain cognizant of the fact that it is very easy to fail to notice the deleterious long-term effects of the imposition of our legal, moral, and ethical tenets upon the Native American way of life. The respect for other religions inherent in the Framers' intent behind the Establishment Clause is often lost in the shuffle of litigation over sacred sites.

Specifically, Native American faiths depart from Christian beliefs on fundamental issues such as "God, human nature, the environment, time and space, individuality, . . . and universal truths."[15] When analyzed, it is readily apparent how many of the religious and philosophical underpinnings of the American legal system have dealt tremendous blows to the very fabric and essence of the Native American way of life. As Anastasia Winslow discovered in her study, Christian faith is couched in terms of several fundamental beliefs:

> In sum, there are inherent conflicts between Christian and Native American faiths, most notably as they relate to the environment. Under Christian teachings, God is identified with a male human form; animals are placed beneath humans on a hierarchical scale; the natural world is considered a place to be controlled and dominated (whether for the sake of industrialization or protection as stewards); and time is viewed linearly, such that process and development are associated with progress. Also, these views are considered universal human truths, such than non-adherents may be condemned and considered needy of conversion to achieve salvation.[16]

Conversely, typical Native American beliefs underscore a way of life foreign to most Christian adherents:

> Native Americans, on the other hand, define the Great Spirit in terms of an indefinable presence that is connected to the natural world; they consider animals and nature as godly, with the natural world reflecting a place of gods, spirits, and life on an equal, if not superior, level to human beings; they apply a cyclical perspective of time, seeking to maintain a natural order; and they do not expect all peoples to adhere to their views. They also stress community life and involvement, as opposed to individual relations with one's God.[17]

These fundamentally distinct belief systems have clashed for hundreds of years, with the battles played out both on the Native Americans' aboriginal lands, and in the federal courts. The Christian motivation to convert the

15. *Id.* at 1295-1301.
16. *Id.* at 1301.
17. *Id.*

"savage" and "heathen" Indians to the more "enlightened" views of Western religions has robbed Native Americans of both physical land as well as spiritual sanctity. Winslow observes that "a subtle connection has existed as well, affecting property rules and other laws and governmental policies that have had the effect of dispossessing Native Americans of their sacred sites."[18] In light of a history of attempts to eradicate the Native American way of life through such government-endorsed policies as allotment and assimilation, substantive law has shaped Native American sacred site protection on federal public lands.

IV. Free Exercise Law Applicable to Sacred Site Protection

The law pertaining to Native American sacred site protection is one characterized by tension between the dual mandates of the First Amendment's "religion clauses," the Free Exercise Clause and the Establishment Clause. The first sentence of the First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ."[19] Although the focus of sacred site protection has shifted from the Free Exercise Clause to the Establishment Clause over the last ten years, it is nonetheless necessary to ascertain the role of the Free Exercise Clause in this area of Native American law.

The Supreme Court has established a "compelling interest test" to deal with Free Exercise challenges. The test states that any government action that burdens the free exercise of religion is prohibited unless that government action furthers a compelling governmental interest.[20] The holdings of four key cases[21] have led some commentators to bemoan the death of the Free Exercise Clause as an effective defender of Native American rights to sacred sites on federal public lands:

> The Sherbert analysis suggests that government actions that harm sacred lands, and thereby burden Indian religious beliefs, are prohibited under the Free Exercise Clause. Indians found, however, that the courts were not willing to interpret the Free Exercise Clause to prohibit government actions harming sacred lands, despite significant impacts to religious practices and beliefs.[22]

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18. *Id.* at 1308.

19. U.S. CONST. amend. I.

20. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

21. *See* Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); Badoni v. Higginson, 638 F.2d 172 (10th Cir.), *cert. denied*, 449 U.S. 953 (1980); Wilson v. Block, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

22. Grimm, *supra* note 9, at 19-20.

Sequoyah v. Tennessee Valley Authority[23] involved construction of a dam which caused flooding of sacred Native American land. However, because this land was not found by the court to be "central" or "indispensable" to the Native American religious practices involved, the Court denied relief on Free Exercise grounds. Furthermore, in *Badoni v. Higginson*,[24] the court refused to protect another sacred site from the adverse effects of dam construction because the court found the government's compelling interest in the federal land dam construction to be superior to that of the Native Americans.[25] The variance between this compelling interest test as applied to Native Americans and non-Native Americans prompted one commentator to note this disparate treatment:

> In the sacred-site cases, however, the substantial burden standard was heightened. Courts required Native Americans to come forward with factual proof that the sites were central and indispensable to their religions, that is, that their religions could not be practiced without them. However, as applied to Western religions, the centrality test had been rejected, and claimants were protected from even indirect burdens on their religious practices.[26]

As Winslow notes, the effective end of Free Exercise protection of Native American sacred sites was soon to follow.

The United States Supreme Court, *in Lyng v. Northwest Indian Cemetery Protective Ass'n*,[27] also addressed the Free Exercise issue. In *Lyng*, the Forest Service was preparing to harvest timber in the "high country" of northwest California, sacred to Yurok, Karok, and Tolowa Indians.[28] Moreover, the Forest Service also planned to construct a road that would run near a sacred site. Despite lower court rulings in favor of the Native Americans, the Supreme Court held that the Free Exercise Clause did not prohibit the Forest Service's actions, because the government programs at issue were sufficiently compelling:

> This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require

23. 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

24. 638 F.2d 172 (10th Cir.), *cert. denied*, 449 U.S. 953 (1980).

25. Badoni v. Higginson, 638 F.2d 172, 177 n.4 (10th Cir.), *cert. denied*, 449 U.S. 953 (1980).

26. Winslow, *supra* note 13, at 1313.

27. 485 U.S. 439 (1988).

28. *Id.* at 459 (Brennan, J., dissenting).

> government to bring forward a compelling justification for its otherwise lawful actions.[29]

The Court's ruling effectively ended any possibilities of successful Native American sacred site challenges under the Free Exercise Clause.

Justice Brennan's dissenting opinion, though it did not suggest any wholesale solution to the issue of Native American sacred site protection, is nonetheless deserving of serious scrutiny. Not only does Justice Brennan foreshadow the Establishment Clause litigation to come,[30] but he also forcefully and eloquently articulates the frustration of the Native American people in the aftershock of *Lyng*. He argues that the Court's decision in *Wisconsin v. Yoder*,[31] which invalidated a compulsory public school attendance policy under the Free Exercise Clause because of the coercive effects it would have on nearby Amish communities, was analogous to the case at bar: "Admittedly, this threat arose from the compulsory nature of the law at issue, but it was the impact on religious practice itself, not the source of that impact, that led us to invalidate the law."[32] Moreover, he argues that the inevitable destruction of this aspect of the respondent Native Americans is something which clearly merits even more protection than the interests safeguarded in *Yoder*:

> Here, in stark contrast, respondents have claimed — and proved — that the desecration of the high country will prevent religious leaders from attaining the religious power or medicine indispensable to the success of virtually all their rituals and ceremonies. . . . Here the threat posed by the desecration of sacred lands that are indisputably essential to respondents' religious practices is both more direct and more substantial than that raised by a compulsory school law that simply exposed Amish children to an alien value system.[33]

Further, aside from the specific Free Exercise questions raised, Justice Brennan is also singularly cognizant of the different value and belief systems which underscore the European American and Native American ways of life. In foreshadowing cases like *Bear Lodge*, he is aware of the effects of these fundamental differences on concepts like property rights and the legal system, and he chastises the Court for failing to address this inescapable issue:

> In addition, the nature of respondents' site-specific religious practices raises the specter of future suits in which Native

29. *Id.* at 450-51.
30. *Id.* at 476 (Brennan, J., dissenting).
31. 406 U.S. 205 (1972).
32. *Lyng*, 485 U.S. at 467.
33. *Id.* at 467-68.

> Americans seek to exclude all human activity from such areas. These concededly legitimate concerns lie at the very heart of this case, which represents yet another stress point in the longstanding conflict between two disparate cultures — the dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that hold land sacred. Rather than address this conflict in any meaningful fashion, however, the Court disclaims all responsibility for balancing these competing and potentially irreconcilable interests, choosing instead to turn this difficult task over to the Federal Legislature. . . . In my view, however, Native Americans deserve — and the Constitution demands — more than this.[34]

Prefiguring the accommodation issue, Justice Brennan contends that because these fundamentally opposite systems of belief can never be fully reconciled with each other, compromise is essential to any evenhanded constitutional analysis.[35]

Despite Justice Brennan's moving and persuasive words, *Lyng* has forced Native Americans seeking protection of their sacred sites to turn to the Establishment Clause as the primary source of constitutional protection.

V. Establishment Clause Law Applicable to Sacred Site Protection

At the heart of Establishment Clause jurisprudence, as it pertains to sacred site protection, is the concept of accommodation. It is accommodation which has kept hope alive for sacred site protection, ensuring that the federal government applies the Establishment Clause impartially and evenhandedly. Specifically, "the fact that neutral land management decisions cannot create a burden on free exercise does not relieve agencies of their obligation to accommodate Indian religious practices. To the contrary, the Constitution 'affirmatively mandates accommodation, not merely tolerance, of all religions.'"[36] Even in ruling against the Native American parties in *Lyng*, the case did mention that accommodation of Native American religious interests should not be discouraged.[37] Courts must be cognizant of the fact that such accommodation will necessarily involve a balancing of interests. The Free Exercise rights of the Native Americans, and important governmental interests must both be accommodated while making sure not to violate the Establishment Clause.

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34. *Id.* at 473.
35. *Id.* at 474.
36. Grimm, *supra* note 9, at 21 (quoting Lynch v. Donnelly, 465 U.S. 668, 673 (1984)).
37. *Lyng*, 485 U.S. at 454.

The Supreme Court's Establishment Clause jurisprudence has not been clear. Much of the confusion is due to the fact that the Court has employed different tests, while never explicitly overruling previous tests. The *Lemon* test, the coercion test, and the endorsement test play a vital role in shaping Native American sacred site protection. Depending on which test, or tests, a court adopts, Native Americans can be accorded more or less First Amendment protections. As such, each test must be considered in order to determine whether a particular Native American sacred site on federal public land will be protected.

Traditionally, courts have relied on the *Lemon* test, articulated in *Lemon v. Kurtzman*.[38] Though the test has been subjected to harsh scrutiny and criticisms in the past decade, it has never been explicitly overruled and is still good law. According to the test, "a government action violates the Establishment Clause unless (1) it has a secular purpose; (2) its principal effect neither advances nor inhibits religion; and (3) it does not foster an 'excessive government entanglement with religion.'"[39]

The two most important components of the test are the first and second prongs. Under the first prong, it is crucial to note that governmental actions or policies which seek to serve the stated goal of accommodation are sufficiently secular to pass this part of the test.[40] Under the second prong, government action must directly sponsor or further religious activity. Actions which neither advance nor inhibit religion are acceptable.[41]

A second test, articulated by Justice Kennedy in *Lee v. Weisman*,[42] asks "whether or not the accommodation has the effect of coercing persons into conforming their practices with those of a particular religion."[43] This "coercion test" has been applied by courts both as a supplement to *Lemon*, as well as a substitute for it. The thrust of the coercion test is its focus on the context of the particular government action. As such, a prayer read by a chaplain at the beginning of a state legislature session did not violate the Establishment Clause under the coercion test.[44] Yet, where a prayer was read at a state-sponsored high school graduation ceremony, the coercion test did result in an Establishment Clause violation.[45]

The third test, the "endorsement test," as first promulgated by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly*,[46] holds that

38. 403 U.S. 602 (1971).

39. Grimm, *supra* note 9, at 21.

40. Cross & Brenneman, *supra* note 7, at 29 (citing Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987)).

41. *Id.*

42. 505 U.S. 577 (1992).

43. Grimm, *supra* note 9, at 21.

44. *See* Marsh v. Chambers, 463 U.S. 783, 786-95 (1983).

45. *See* Lee v. Weisman, 505 U.S. 577, 596-99 (1992).

46. 465 U.S. 668 (1984).

government actions which send messages "to non-adherents that they are outsiders,"[47] and "to adherents that they are insiders"[48] violates the Establishment Clause. According to one commentator, "Justice O'Connor's endorsement standard would prohibit only those governmental acts that actively promote or advantage particular religious organizations or politically privilege a particular set of religious beliefs."[49]

Depending on the type of test chosen by a particular court, Native American litigants attempting to protect their sacred sites must be certain to craft their arguments in ways that are capable of best satisfying each test. Each test presents its own unique hurdles, as one commentator notes:

> The *Lemon* test's "secular purpose prong is particularly hard to overcome when the activity in question is designed to accommodate religion, as is the second prong requiring that the principal effect of the government action not "advance" religion. Similarly, neutrality may be a difficult principle to adhere to when the accommodation is for specific Indian sacred sites and practices on federal land. . . . The endorsement test may be the easiest to meet, provided it is not limited to religious symbols placed in public for a, because an accommodation of Indian religious practices does not necessarily demonstrate an "endorsement" of Indian religion, but rather it demonstrates compliance with the principles embodied in AIRFA.[50]

As such, on top of the loss of the effectiveness of the Free Exercise argument in the wake of *Lyng*, Native American litigants must also cope with the additional uncertainty of which substantive standard a court will apply in considering a sacred site challenge.

Considering the numerous issues raised by the Establishment Clause approach, an analysis of *Bear Lodge Multiple Use Ass'n v. Babbitt*[51] — a case currently on appeal — helps not only to examine the theoretical underpinnings of this area of the law, but also to aid in determining the most efficacious solution to sacred site protection. After focusing on the factual context that gave rise to the litigation, the analysis will shift towards the impact of the Supreme Court's general Establishment Clause jurisprudence on that case, as well as on future cases.

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47. Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in judgment) (citing *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

48. *Id.*

49. Cross & Brenneman, *supra* note 7, at 33 (citing Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 712-21 (1994) (O'Connor, J., concurring in part and concurring in judgment)).

50. Grimm, *supra* note 9, at 21-22.

51. 2 F. Supp. 2d 1448 (1998), *aff'd*, 175 F.3d 814 (10th Cir. 1999).

VI. Background of the Bear Lodge Litigation

Located in northeast Wyoming, Devil's Tower was named our country's first national monument by President Theodore Roosevelt in 1906, pursuant to the Antiquities Act.[52] It was given the name "Devil's Tower" by a team of scientists on an expedition to the area in violation of Indian treaty rights.[53] This imposing structure, formed from the core of an ancient volcano, was called "Mateo Tepee" by Native Americans, meaning "Bear Lodge."[54] It is sacred to several Native American tribes, including the Lakota, Dakota, and Nakota Sioux. According to the Native American legend, the Tower got its name in a way far different than that utilized by the American scientists:

> A troy was transformed into a bear, the legend says, and chased his seven sisters, who took refuge on a large stump. In response to their prayers, the stump grew, and the bear raked its side with his claws — producing the tower's distinctive columns. Stranded on the summit, the girls died, and ascended into the sky to become the stars of the Big Dipper.[55]

During the month of June, the Lakota and other tribes gather to perform their "Sun Dance," in order to commemorate the summer solstice, a spiritual time of power for the Sioux.[56] The Sun Dance is one of the most important expressions of these tribes' faith. According to Greg Bourland, president of the Cheyenne River Sioux tribe, "The Lakotas, for about 10,000 to 12,000 years, performed an annual Sun Dance at Devils Tower" — a dance which Bourland cites as the most important of the seven Lakota ceremonies.[57] Ironically, the Sun Dance was singled out in a 1921 federal policy attempting to eradicate Native American culture entirely:

> The sun-dance, and all other similar dances and so-called religious ceremonies are considered "Indian offences" under existing regulations, and corrective penalties are provided. I regard such restrictions as applicable to any dance which . . . involves the reckless giving away of property . . . frequent or prolonged periods of celebration . . . in fact any disorderly or plainly excessive performance that promotes superstitious cruelty,

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52. Great Outdoor Recreation Pages, *Devils Tower National Monument* (visited Sept. 27, 1999) <http://www.gorp.com/gorp/resource/us_nm/wy_devil.htm.>.

53. *Id.*

54. *Id.*

55. Karen J. Coates, *Stairway to Heaven: When a Climbing Mecca Is Also a Sacred Site*, SIERRA, Nov. 21, 1996, at 27 (vol. 81, no. 6), *available in* LEXIS, News Library, ASAPII File.

56. George Snyder, *Devil's Tower Climbers Suing over Government's Ban*, S.F. CHRON., June 21, 1996, at A11.

57. Candy Hamilton, *One Man's Rock Is Another's Holy Site*, CHRISTIAN SCI. MONITOR, June 12, 1996, at 4, *available in* LEXIS, News Library, CSM File.

> licentiousness, idleness, danger to health, and shiftless indifference to family welfare.[58]

Aside from its prominent appearance in the Steven Spielberg film, "Close Encounters of the Third Kind," the Tower has made a name for itself in a different milieu, rock climbing. The cracks on the Tower, attributed to the Native American legend of the bear clawing at the Tower, have become a big draw for those interested in the best "crack climbing" in the world.[59] According to statistics, the number of climbers of the Tower each year has grown to over 6000.[60] Over the past several years, this dramatic increase in the number of climbers at the Tower has manifested itself in several notable distractions to Native American ceremonies and rituals, most notably the Lakota Sun Dance in June. Problems arose when Native Americans using Bear Lodge complained about, among other things, the disrupting noise made by climbers and their gear, as well as the adverse environmental impact of new bolts and trails:

> "We can hear them (the climbers) cussing and shouting. Sound really carries from that high," says a Lakota woman who has led a religious ceremony at the tower for the past 10 years. "The tower looks trashy with abandoned pitons and ropes, some fluorescent. It's not treated respectfully. We have no contact with them, but the attitude overflows," she says.[61]

Moreover, many Native American elders worry about the ability of the tribes to educate their children in their traditional ways in light of such interference. In some of the initial Bear Lodge testimony, Lakotas testified that "they cannot teach their children respect for their religion when they go to the summer ceremonies if they see people 'playing' on such an important shrine."[62] In light of the growing number of contemporary Native Americans turning away from their traditional cultures, such teachings are imperative to the survival of those proud traditions. "'This is very important to Indian people, especially at a time when even the dominant society sees the need for more spirituality and family values,' said Elaine Quiver, a Lakota member of the Gray Eagle Society, a spiritually traditional group."[63] In today's tribal society, in large part due to a simple lack of funds, sacred site protection is

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58. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 754 (4th ed. 1998) (quoting FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 175 (Univ. of N.M. Press 1971) (1942)).

59. Jim Carrier, *Wyoming Cultures Clash at Devil's Tower*, DENVER POST, Nov. 17, 1996, at 30, *available in* News Library, DPOST File.

60. *Bear Lodge*, 2 F. Supp. 2d at 1450 n.1.

61. *Id.*

62. *Id.*

63. Snyder, *supra* note 56.

often relegated to the back burner: "Many tribes face more immediate concerns, such as federal recognition, economic development, or attacks on their budgets or sovereignty rights by the current U.S. Congress. Many are still struggling for the basic needs of housing, health care and education."[64]

Commentators echo these sentiments, as well as add new insight as to the resurgence in interest in protecting these sacred sites:

> The Native Americans' demand for cultural access to Devils Tower may reflect two significant trends in contemporary Indian Country. First, many Native American communities have sought to re-vitalize their traditional Native American ceremonial values and practices as a means of combatting significant social problems among their members, such drug or alcohol abuse. Second, Native American youth in both reservation and urban settings have re-asserted their interest in understanding and participating in their once suppressed Native American cultural and ceremonial heritage.[65]

Amidst these simmering concerns, the National Park Service (NPS) decided to take some action. Deborah Liggett, Superintendent of Devil's Tower National Monument, like any other federal land manager, is given wide discretion in making decisions concerning the land.[66] That discretion must be considered when deciding how to balance the interests of the Native American sacred sites, the climbers of the Tower, and the environmental impacts of climbing upon the Tower. In 1995, under the direction of Ms. Liggett, and after exhaustive consultation with affected groups, the NPS issued a Final Climbing Management Plan (FCMP) to address the concerns resulting from climbers at the Tower. Specifically, the FCMP stated, according to the court's summary:

> The FCMP "sets a new direction for managing climbing activity at the tower for the next three to five years," its stated purpose being, "to protect the natural and cultural resources of Devils Tower and to provide for visitor enjoyment and appreciation of this unique feature." To protect against any new physical impacts to the tower, the FCMP provides that no new bolts or fixed pitons will be permitted on the tower, and new face routes requiring new bolt installation will not be permitted. The FCMP does allow individuals to replace already existing bolts and fixed pitons. In addition, the plan calls for access trails to be rehabilitated and maintained, and requires camouflaged climbing equipment, and

64. Smith & Manning, *supra* note 6.
65. Cross & Brenneman, *supra* note 7, at 22.
66. *Id.* at 24.

> climbing routes to be closed seasonally to protect raptor nests. The FCMP further provides that "[i]n respect for the reverence many American Indians hold for Devils Tower as a sacred site, rock climbers will be asked to voluntarily refrain from climbing on Devils Tower during the culturally significant month of June."[67]

Moreover, concerning enforcement and future plans, the Court also summarizes the FCMP's primary effects:

> The NPS represents that it will not enforce the voluntary closure, but will instead rely on the climbers' self-regulation and a new "cross-cultural educational program" "to motivate climbers and other park visitors to comply." The NPS has also placed a sign at the base of the Tower in order to encourage visitors to stay on the trail surrounding the Tower. Despite the FCMP's reliance on self-regulation, it also provides that if the voluntary closure proves to be "unsuccessful," the NPS will consider taking several actions including: (a) revising the climbing management plan; (b) reconvening a climbing management plan work group; (c) instituting additional measures to further encourage compliance; (d) change the duration and nature of the voluntary closure; (e) converting the June closure to mandatory; and (f) writing a new definition of success for the voluntary closure. Factors indicating an unsuccessful voluntary closure include, little to no decrease in the number of climbers, an increase in the number of unregistered climbers and increased conflict between user groups in the park. The NPS, however, states that the voluntary closure will be "fully successful" only "when every climber personally chooses not to climb at Devils Tower during June out of respect for American Indian cultural values."[68]

Additionally, one final aspect of the FCMP sparked the initial litigation. The original FCMP "contained a provision stating that commercial use licenses for June climbing guide activities would not be issued by the NPS for the month of June."[69] This commercial climbing ban, along with the rest of the FCMP, was challenged by a group of local climbers and climbing tour guides.

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67. *Bear Lodge*, 2 F. Supp. 2d at 1449-50.
68. *Id.* at 1450.
69. *Id.*

VII. Bear Lodge Litigation

As the litigation began, the Lakota, Dakota, and Nakota Sioux were anticipating the 1996 summer solstice as one of the most important in the histories of the respective tribes. "According to their spiritual traditions, this is a time when the Sacred Hoop of the Sioux — and, by extension, harmony for all people — is to be mended after seven generations of oppression and environmental degradation that they believe threatens all humanity."[70] As such, a great deal hung in the balance.

Though most climbers respected the voluntary June ban, Andy Petefish, the owner of Tower Guides (a commercial climbing guides service adjacent to the Tower), brought the litigation challenging the FCMP. On behalf of Petefish, other climbers, and the Bear Lodge Multiple Use Association (representing timber, mining and ranching interests), the Mountain States Legal Foundation (MSLF), a conservative organization, commenced the litigation.[71] The basis of the suit was that the FCMP was an unconstitutional government action in violation of the First Amendment.

The MSLF argued that the FCMP was a coercive violation of the Establishment Clause, and that the accommodation of Native American religion simply went too far. William Perry Pendley, an attorney for the MSLF, said that, "Many people feel having the government say we should bend on the knee of fealty at this place is blasphemous."[72] Andy Petefish, after seeing his business' income drop one third after the closure,[73] was unsympathetic to the Native American arguments: "'No one is stopping Native Americans from performing ceremonies or anything else. If they find offense and don't like all the noise they just have to live with it.'"[74] Finally, Todd Welch, another MSLF attorney, argued that the FCMP equated to "'receiving preferential treatment on federal lands. . . . I don't think they have a right to solitude.'"[75]

Conversely, the Native Americans argued that the issue hinged on respect of the religious beliefs of others, and that the FCMP was a permissible measure of accommodation under the First Amendment. Superintendent Deborah Liggett was acutely aware of the significance of land to Native American religious practice. The Lakota and other tribes argued that the FCMP was necessary to teach its own people about Native American heritage.

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70. Snyder, *supra* note 56.

71. *Id.*

72. Christopher Smith, *Park Service's Sacred-Ground Rule Stands, But Policy Has Lots of Nonbelievers: Seeking Religious Respect at Parks Is OK, Judge Says*, SALT LAKE TRIB., May 3, 1998, at A1, *available in* News Library, SLTRIB File.

73. Carrier, *supra* note 59.

74. *Id.*

75. *Id.*

Steven Gunn, an attorney for the Indian Law Resource Center, argued that, "This situation is no different than what other government agencies do on other federal property. For example, recreational activities are not allow [sic] at Arlington National Cemetery during religious ceremonies."[76] Moreover, Mr. Gunn contended that "there are countless churches and chapels on government lands that, when services are taking place, disruptive activities are simply not allowed."[77] Finally, Cheyenne lawyers have argued that, "twice a year at Tumacacori National Historic Park in Arizona, the Park Service sponsors a Catholic mass reenacting 18th century religious traditions."[78]

Initially, the court was confronted with the plaintiffs' motion for a preliminary injunction to bar the FCMP's provision involving the mandatory ban on commercial climbing in the month of June. Citing the Plaintiffs' complaint, as well as the Order issued by the presiding Judge (Judge Downes), Professor Raymond Cross described the ruling in his recent law review article:

> Judge Downes ruled the prohibition of commercial guides violates the Establishment Clause, and found that the proposal to close Devils Tower to all climbing in June, if the voluntary closure fails to significantly reduce climbing, amounted to a threat that was governmentally coercive of individual action and conduct in favor of Native American religious activities.[79]

In decrying that decision, Cross argues that Judge Downes relied too heavily on *Lyng*,[80] and not at all on the applicable Establishment Clause caselaw.[81]

In his opposition to Judge Downes' ruling on the preliminary injunction, Cross goes on to articulate how the case would have come out under the Establishment Clause, had Judge Downes properly utilized it. He argues that Superintendent Liggett's accommodation in the FCMP passes constitutional muster under the *Lemon* test,[82] as well as under the coercion and

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76. Paul Richardson, *Devil's Tower: A Religious Mecca*, INDIAN COUNTRY TODAY (LAKOTA TIMES), Aug. 3, 1998, at A6, *available in* Westlaw, 1998 WL 18037226.

77. *Id.*

78. Smith & Manning, *supra* note 6.

79. Cross & Brenneman, *supra* note 7, at 27.

80. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 459 (1988).

81. Cross & Brenneman, *supra* note 7, at 28. Specifically, Cross argues that Judge Downes made three errors: (1) he failed to apply *Lemon*; (2) he failed to apply the coercion test or the endorsement test; and (3) he utilized solely Free Exercise cases, while paying mere lip service to the line of Establishment Clause caselaw. *Id.*

82. *Id.* at 30-31. Cross argues that there are clearly several secular purposes — namely, protection of the environment and raptors, and management of recreation. Its strongest secular purpose, however, is the fact that it is itself accommodation, a valid secular purpose in the eyes of the Supreme Court; the second prong is satisfied, because the FCMP merely provides access to the Tower, rather than advancing or inhibiting religion; finally, there is no government entanglement in religion. *Id.*

accommodation.[87] Since accommodation is a valid secular purpose, the FCMP satisfied the first prong of *Lemon*.[88]

In considering the second prong of *Lemon*, Judge Downes also mentions Justice Kennedy's coercion test. In doing so, he looks at controlling Tenth Circuit precedent, i.e., *Badoni*, to address whether the voluntary ban is coercion such that the primary effect of the accommodation is the advancement of religion. "If the NPS is, in effect, depriving individuals of their legitimate use of the monument in order to enforce the tribes' rights to worship, it has stepped beyond permissible accommodation and into the realm of promoting religion."[89] Despite arguments by the plaintiffs that the voluntary ban was voluntary "in name only" and coercive, the court held that it is not coercive simply because of the goal of having all climbers adhere to the voluntary ban. With this holding, the second prong of *Lemon* is satisfied.[90] Finally, the third prong is also satisfied, because the character and purposes of the FCMP are such that the government is merely allowing Native Americans "a more peaceful setting" in which to worship.[91]

In sum, Judge Downes upholds the validity of the amended FCMP:

> [T]he voluntary climbing ban[] is a policy that has been carefully crafted to balance the competing needs of individuals using Devil's Tower National Monument while, at the same time, obeying the edicts of the Constitution. As such, the plan constitutes a legitimate exercise of the Secretary of the Interior's discretion in managing the monument.[92]

As amended, the FCMP is thus a constitutionally sound measure of accommodation of Native American interests in a sacred site.

Only days after the decision, MSLF attorneys made it clear that they would appeal. Moreover, they expressed confidence that the 10th Circuit Court of Appeals would rule again against Native American interests, as they did in *Badoni*: "'Frankly, this [appeal] is a slam dunk,' says Pendley, whose group also has sued President Clinton over creation of the Grand Staircase-Escalante National Monument in southern Utah. 'I'm very optimistic the 10th Circuit will overturn this opinion.'"[93]

Since the U.S. Supreme Court has yet to directly rule on the Establishment Clause as it applies to federal public land management of sacred sites, the

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87. *Id.* at 1454.

88. *Id.* at 1455.

89. *Id.*

90. *Id.* at 1455-56.

91. *Id.* at 1456. Judge Downes also states that since the tribes benefiting from the ban are not solely religious groups, but also a group with common culture and heritage, there is less danger of excessive government entanglement in *solely* religious activities.

92. *Id.* at 1456-57.

93. Smith, *supra* note 72.

endorsement tests.[83] Moreover, Cross argues that the FCMP is even constitutional under the Free Exercise law of *Lyng*:

> Superintendent Liggett's regulatory action implements the *Lyng* decision by preserving the Native Americans' traditional cultural access to a well-established sacred site at Devils Tower. Though her action does represent a clear break with the majority culture's traditional hostility to Native American culture and religion, it also effectuates a permissible interpretation of her statutory preservation duties consistent with the *Lyng* accommodation principle. Public land managers may, under *Lyng*, consider Native American cultural access to sacred sites in their revision of their land use or management plans. Superintendent Liggett's action shows that the federal government's ethnocentric disregard of Native American culture and religion need not continue to rule the National Park Service's decision-making process.[84]

Professor Cross concludes with a proposal for a change in Native American sacred site law, which addresses much of the Native American disappointment after the preliminary injunction was granted.[85] However, in a decision handed down in April of 1998, following the plaintiffs' submission of an amended petition, Judge Downes upheld a slightly revised FCMP.

This recent decision dealt with the constitutionality of the voluntary ban on climbing in June proposed by the FCMP, as well as the NPS' cultural education programs and signs at Devil's Tower. The MSLF argued that the FCMP, even without the commercial climbing ban, violated the Establishment Clause. After holding that the Plaintiffs lacked standing to contest the constitutionality of the FCMP,[86] Judge Downes turned to the Establishment Clause issue. Following Tenth Circuit precedent that mandates that Circuit to apply the *Lemon* test in conjunction with Justice O'Connor's endorsement test, Judge Downes was quick to note *Lynch*'s affirmative mandate of

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83. *Id.* at 33. Cross states:

> The proposed closure of Devils Tower violates neither the coercion nor the endorsement test. Native American religious practitioners do not proselytize, nor will their practices create a coercive environment that would cause spectators to be compelled to participate. Moreover, the presence of Native Americans performing religious ceremonies at Devils Tower could not reasonable cause observers to feel as though Native Americans are full members of the political community, but the spectators are not; thus, no governmental endorsement would occur.

Id.

84. Cross & Brenneman, *supra* note 7, at 36.

85. *See infra* Part VIII.

86. Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448, 1452-53 (1998), *aff'd*, 175 F.3d 814 (10th Cir. 1999).

hope is that *Bear Lodge* will actually make its way to the Supreme Court and set new precedent. In addition to the Supreme Court, legislative efforts and law review scholarship also addressed the sacred site issue.

VIII. Legislative Efforts and Proposed Solutions

A. What Can Be Done Under Existing Legislation

Legislatively, there have been several attempts to counter the negative effects of decisions such as *Lyng*. However, given the extremely daunting task of crafting legislation that will accord with Establishment Clause principles, the legislation that has passed has generally been of little practical import. Under the current authority, Native Americans seeking sacred site protection can utilize several separate legislative and executive tools, among them: NHPA, NFMA, AIRFA, and recent Executive Orders from the Clinton Administration.

Section 106 of the National Historic Preservation Act (NHPA),[94] can be utilized to protect sacred sites without regulating public use of the land or mandating respect for Native American values. Under the NHPA, "agencies must take into account the effect of their actions on properties that are eligible for listing or are listed on the National Register of Historic Places."[95] In determining whether a site will be considered a "traditional cultural property" under the Act, the religious significance of a site is a significant factor.[96] However, this Act is of doubtful efficacy on its own, given its inability to prevent federal agencies that follow proper procedure from affecting sacred sites.[97]

A second possible legislative tool for sacred site protection is the National Forest Management Act (NFMA).[98] The NFMA ensures that in planning land management decisions, federal agencies must proffer a plan which seeks Native American input at various stages of the process.[99]

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94. 16 U.S.C.A. § 470f (1994).

95. Grimm, *supra* note 9, at 24.

96. *Id.*

97. *Id.* "TCP identification has helped to avoid unknowing impacts to sacred lands, where Indians can reveal such information. TCP identification does not, however, prevent an agency from adversely affecting such sites, so long as the agency has followed the correct processes and considered the views of Indians. For that reason, TCP identification alone is not a particularly effective mechanism to ensure protection of sacred sites, as agencies can, and do, decide to proceed with projects despite impacts to TCPs."

98. 16 U.S.C. § 1604 (1994).

99. *Id.* Specifically, the Forest Service "coordinates with Indian tribes, gives consideration to tribal objectives, and meets with tribes at various stages of the planning process. In addition, forest planning requires the identification, protection, interpretation, and management of significant cultural resources." *Id.* (citing 36 C.F.R. §§ 219.7, 219.24 (1996)) (citations omitted).

A third option, though often dismissed for its lack of enforcement "teeth," is the American Indian Religious Freedom Act (AIRFA).[100] In his dissenting opinion in *Lyng*, Justice Brennan also gave a brief synopsis of the language federal land managers and courts must comply with under AIRFA:

> Indeed, in the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996, Congress expressly recognized the adverse impact land-use decisions and other governmental actions frequently have on the site-specific religious practices of Native Americans, and the Act accordingly directs agencies to consult with Native American religious leaders before taking actions that might impair those practices. Although I agree that the Act does not create any judicially enforceable rights, see ante, at 1327-1328, the absence of any private right of action in no way undermines the statute's significance as an express congressional determination that federal land management decisions are not "internal" Government "procedures," but are instead governmental actions that can and indeed are likely to burden Native American religious practices. That such decisions should be subject to constitutional challenge, and potential constitutional limitations, should hardly come as a surprise.[101]

Much recent debate over sacred site protection seems to miss Justice Brennan's point that even though there is no statutory cause of action created by AIRFA, it is nonetheless mandatory that federal land managers view its commands with the utmost seriousness. Opponents of sacred site protection dismiss the act as an ineffectual policy statement at best.

Finally, the Clinton administration has been instrumental in urging the importance of the issue of sacred site protection. Specifically, it has issued two executive orders. In May 1996, following a 1994 Order that directed federal land managers to consult with Native American nations as with sovereign nations, President Clinton issued Executive Order 13,007, mandating that federal agencies "shall, to the extent practicable, permitted by law, and not clearly inconsistent with agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of sacred sites."[102] In her law review article on sacred site protection, Lydia Grimm assessed the Order's impact:

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100. 42 U.S.C. § 1996 (1994).

101. Lyng v. Northwest Indian Cemetery Protection Ass'n, 485 U.S. 439, 471 (1988) (Brennan, J., dissenting).

102. Exec. Order No. 13,007, § 1(a), 61 Fed. Reg. 26,771 (1996).

> While section 1(a)(1) restates the principles already applicable to agencies via AIRFA, section 1(a)(2) adds something new by focusing agencies on the physical integrity of the sites. Requiring agencies to avoid harming the physical integrity of sacred sites helps close a gap left by AIRFA, since providing access to sacred sites is virtually meaningless if the site itself is not protected from damage.[103]

Grimm goes on to say, however, that the language of the Order is "cautious" because of the inescapable issue that there will always be uncertainty in Establishment Clause law, and that there is simply no such thing as a clear-cut solution.[104] As such, she urges the passage of a general sacred lands statute.

B. What Could Be Done — Legislative Proposal

The relative shortcomings of these current laws accentuate this need for such general sacred site legislature. However, the myriad practical difficulties of drafting general sacred site legislature which strikes the constitutionally appropriate Establishment Clause balance between accommodation and entanglement presents a daunting task. The Senate found that out in 1994 when its proposed Native American Cultural Protection and Free Exercise of Religion Act failed to pass, due in large part to Establishment Clause concerns over its constitutionality.

Responding to decisions like *Lyng*, the Native American Cultural Protection and Free Exercise of Religion Act of 1994 (the Act) developed several key sections attempting to deal with sacred site protection. Noting that AIRFA's general policy statement has been ineffective in its application to federal land managers,[105] Senator Inouye's report lays out the basic intended effects of Title I of the Act, Protection of Sacred Sites:

> There are currently over 44 Native American sacred sites that are threatened by tourism, development and resource exploitation. Title I of the bill provides for the protection of Native American sacred sites that are located on public lands. Although the original bill provided only for the protection of the sites themselves, the Interior Department urged that the bill extend protection to the traditional cultural and religious practices associated with such sites, and this approach is adopted in S. 2269 as amended.
>
> The framework of the original bill established a process that would enable Indian tribes and federal agencies to enter into consultation if a Native American sacred site was to be

103. Grimm, *supra* note 9, at 25.

104. *Id.* Grimm says that the "to the extent practicable," language "reveals some uncertainty about agency efforts, and authority, to protect sacred lands." *Id.*

105. S. REP. No. 103-411, at 2 (1994).

> detrimentally affected by a federal undertaking — following the model of the National Historic Preservation Act (NHPA). . . . The consultation process that is contained in S. 2269, as amended, provides for notice to affected tribes and Native Hawaiian organizations when a covered federal activity may have an adverse impact on a Native American sacred site. In turn, the affected tribes or Native Hawaiian organizations must notify the federal agency of their desire to enter into a consultation process to assure that all viable alternatives to the potential adverse impact to a sacred site are given consideration. If there is no alternative other than to adversely affect a sacred site, the government bears the burden of establishing that there are no less restrictive means and that proceeding with the activity serves a compelling governmental interest.[106]

In drafting Title I of the Act, Senator Inouye states that there was extremely close attention paid to the Establishment Clause issues raised by the proposed bill. However, he notes, not without a great deal of irony, that the federal government has been excessively entangled in Native American religions throughout the history of its federal-tribal relationship. This is a very clear indictment of the very same government that is concerned with ensuring that sacred site protection legislature does not violate the Establishment Clause.[107]

Based upon the history of federal oppression of the Native American people, coupled with the lack of "clear guidelines in prior rulings of the Supreme Court as to how a statute that is designed to remedy a past and pervasive pattern of discrimination would be construed within the context of First Amendment jurisprudence,"[108] Senator Inouye explains how the drafters of the proposed bill came up with their proposed solution:

> S. 2269 was drafted with these distinctions in mind: (1) that the federal government's discrimination against Native American traditional cultural and religious practices was exercised against individuals and did not follow a line defined by the federally-recognized tribal status; and (2) that protections afforded to the traditional cultural and religious practices of native peoples, including California Indians and Native Hawaiians, must be extended within a cultural context. The definitions contained in S. 2269 are designed to draw these distinctions so that the remedial nature or the statute might rest upon a constitutionally permissible foundation.[109]

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106. *Id.* at 5-6.
107. *Id.* at 7.
108. *Id.* at 8.
109. *Id.*

In lieu of the lack of clear Supreme Court guidance on the issue, Senator Inouye's report concluded that this bill, as amended, was sufficient to pass constitutional muster.

Unfortunately for the Act, both the Justice Department and the Department of Interior disagreed, and eventually the final vote of the Senate did as well. In the same Senate Report, both the Justice and the Interior Departments articulated their concerns about the amended bill. To their credit, both lauded the purposes behind the Act, and stated that they hoped all involved groups could work together in order to craft a constitutionally sound final product. Both, however, were concerned about the Supreme Court's decision in *Board of Education of Kiryas Joel Village School District v. Grumet*,[110] which "looked behind" the structure of a town created for its "cultural" independence, in order to conclude that the principles behind the separate community was "religious," and thus violative of the Establishment Clause.[111] Moreover, the Justice Department anticipated Equal Protection problems as well, with regard to those tribes not federally recognized, and thus not able to benefit from the federal-tribal relationship, a relationship between two sovereigns.[112]

The Justice Department read *Kiryas Joel* to invalidate Senate Bill 2269 because the shift from "religious" protection to "cultural" protection was a leap that the Supreme Court was simply not willing to buy.[113] Such matters of syntax did not, in the eyes of the Justice Department, forestall an Establishment Clause violation. The Justice Department also made suggestions as to the burdens of proof, and the definition of "federal lands." The Act failed to pass the Senate, and it appears clear that the biggest stumbling block it encountered was the Establishment Clause.[114]

The Act's history underscores the difficulty of drafting such general sacred site protection legislature. While it may be convenient to adopt the simple position that there can be no progress until a general statute is successfully

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110. 512 U.S. 687 (1994).

111. S. REP. NO. 103-411, at 27. In *Kiryas Joel*, a separate school district established for the sole use of members of an Hasidic sect was found to have "religious" principles at its core. The Court was not convinced by the argument that the community was secular, rather than religious.

112. *Id.* at 28. The Justice Department cited *Morton v. Mancari*, 417 U.S. 535 (1974), in urging that similar protections would only attach to the Native American tribes that were federally recognized.

113. S. REP. NO. 103-411, at 29 (1994).

114. *See, e.g.*, Winslow, *supra* note 13, at 1293. Winslow states,

> Legislative history suggests that the chief pitfall to the sacred site bill was the Establishment Clause to the First Amendment. Traditionally, the Establishment Clause has proscribed laws that have a religious purpose or effect or which excessively entangle the government with religion, ant the sacred-site bill was questioned as promoting religion.

Id.

enacted, it is abundantly clear that such statute does not seem to be possible in the near future. The "Catch-22" at work here is that there is the need for a general sacred lands statute because of the Supreme Court's lack of direct precedent concerning the Establishment Clause and sacred sites, yet that need seems fated to remain unsatisfied because of the mandates of the Establishment Clause which cause such proposed bills to fail. Until the Supreme Court rules on sacred site issues — and the hope is that the appeal of *Bear Lodge* makes it that far — commentators have thus focused their attention to making the most out of the current Establishment Clause jurisprudence on the books today.

C. What Could Be Done — Law Review Proposals

Two proposed solutions to this inability to enact constitutional general sacred site legislation come from separate law review articles. Recognizing the immense difficulty in crafting a constitutionally sound general statute, both draw heavily upon their own perceptions of how the Establishment Clause's mandates should be interpreted. Professor Raymond Cross urges a doctrine mindful of the federal trust relationship, with review of public land managers' decisions under a rational basis standard.[115] And Anastasia Winslow proffers her own solution, drawing simply on a different interpretation of existing caselaw.[116]

Initially, Professor Cross makes a point that appears to indirectly counter the Department of Justice's concern about *Kiryas Joel*. Utilizing Judge Downes' initial ruling on the temporary injunction in *Bear Lodge*, Professor Cross argues that Judge Downes uncritically classifies the Lakota Sun Dance ceremony as religious, rather than cultural, without fully assessing the situation. Drawing upon Professor Jesse Choper's definition of a religious action as one which is intended to have extratemporal consequences, Professor Cross argues that the Sun Dance ceremony is "fundamentally non-commemorative in character and non-salvation directed."[117] As such, Professor Cross argues that the distinction between "cultural" and "religious" does, in fact, pass constitutional muster under the Establishment Clause. In fact, Professor Cross' analysis of *Bear Lodge* can be read as an effective counterargument to the Justice Department's concern over the *Kiryas Joel* logic:

> Judge Downes' interpretation of the "religious activity" and "governmental coercion" elements of the Establishment Clause threatens the Framers' dual commitment to a principle of religious tolerance and a vibrant sphere of private religious activity. Native

115. Cross & Brenneman, *supra* note 7, at 44.
116. Winslow, *supra* note 13.
117. Cross & Brenneman, *supra* note 7, at 41.

> American ceremonial activities at Devils Tower, regarded by expert ethnographers as primarily culturally affiliative activities, are uncritically swept up into his definition of religious activity.[118]

Moreover, Judge Downes' recent ruling in April of 1998 in favor of the Native Americans seems to vindicate Professor Cross' position.

From that conclusion, Professor Cross crafts a two-pronged "alternative framework" with which to approach sacred site protection issues in light of the events at Bear Lodge:

> This framework has two elements: 1) Legal: The public land managers' duty to preserve Native Americans' right of cultural access should be scrutinized under the rational basis test declared by the Supreme Court in *Delaware Tribal Business Comm. v. Weeks*, [430 U.S. 73 (1977)] and 2) Policy: Judicial review of federal agencies' actions to preserve Native Americans' right of cultural access or cultural resources should be limited to the court's assessment of the agency's asserted rational nexus between the identified Native American cultural resource and its proposed action that will preserve that resource from potential destruction or unacceptable injury by a competing use.[119]

Under Professor Cross' legal element, he stresses the federal trust relationship which binds the federal government to preserve Native American cultural resources. This trust doctrine is best enforced when public land managers are allowed to fully exercise the discretion they have in making decisions that concern cultural resources on federal public lands. The federal government's power to enforce the trust relationship with the various tribes comes from the plenary power, which is subject only to rational basis scrutiny.[120] As such, actions taken by federal land managers, such as those taken by Superintendent Liggett at Bear Lodge, will be upheld under Professor Cross' standard, which gives great deference to the discretion of the land manager.

Conversely, Anastasia Winslow argues that the current Establishment Clause rules are, in fact, appropriate, and even helpful to Native American sacred site protection — if applied properly. She focuses specifically on the failure of Senate Bill 2269, and the lessons that can be learned in its wake:

> A focus of inquiry in this Article is whether sacred-site protection must depend upon the tribal status of the religious participants, which was the stumbling block to Senate Bill 2269. Ultimately, I conclude that modified Establishment Clause rules are

118. *Id.* at 42.
119. *Id.* at 42-43.
120. *Id.* at 44.

> dangerous, inconsistent with the purpose behind the Establishment Clause, and should be avoided: the preferred approach is to apply traditional Establishment Clause rules which, if applied consistently, should pose no barrier in protecting Native American sacred sites. But in any event, it is unnecessary and deleterious to religious freedom to limit the scope of religious legislation to Native American tribal members only, as the government should have no role in defining or influencing membership criteria for religious groups, whichever they may be.[121]

Winslow argues that Senate Bill 2269 was legitimate, and, as Professor Cross argues as well, that the limitation of protection of federally recognized tribes only is unnecessary.[122] In fact, Winslow argues that such governmental classifications of "recognized" or "protected" tribes would be tantamount to an Establishment Clause violation:

> When the government attempts to delineate who may be a member of a religious group, participate in a religious ceremony, or receive the full privileges of participating in a religion, it is implicating itself in religious doctrine. The Establishment Clause is threatened. There is little religious autonomy if the federal government may tell Native American tribal members that their religious beliefs and practices will be protected by law, but their friends, family, or anyone else not a tribal member who may want to practice their religions will not be protected.[123]

As such, the thrust of Winslow's argument appears to be that though the Establishment Clause standards articulated by the Supreme Court are, in fact, appropriate, courts have nonetheless failed to apply them correctly in settings involving sacred site protection. Judge Downes' latest ruling in *Bear Lodge* is an example of what Winslow would consider a proper application of existing Establishment Clause law.

Regardless of the view one espouses in the area, and realizing that there is far from one clear-cut legislative or judicial solution to the sacred site protection issue, the future appears to be uncertain. Though the latest ruling in *Bear Lodge* is encouraging for Native Americans, enough other sacred site contexts are presently ripening, ready to unleash new and challenging factual settings upon our courts' Establishment Clause domain. Anticipation of these key situations prepares one for future challenges of sacred site protection as we await the final outcome of the *Bear Lodge* litigation.

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121. Winslow, *supra* note 13, at 1294.

122. *Id.* at 1342. Winslow argues that limiting protection to federally recognized tribes "would tend to influence membership criteria and intrude upon the autonomy of religious groups, actions which are inconsistent with Congress' obligations toward Native American tribes." *Id.*

123. *Id.* at 1343.

IX. The Future of Bear Lodge — Specific Contexts in Which to Evaluate Proposed Solutions

A handful of other sacred sites, all located in the Western United States, present situations in which issues raised by *Bear Lodge*, *Lyng*, and other cases may lead to new litigation. At Bighorn Medicine Wheel in northern Wyoming, the Forest Service, after hearing Native American concerns over tourist interference with the sacred site, abandoned all tourism expansion plans. The Forest Service currently maintains the site as a sacred, traditional site.[124] Also, several summers ago, NPS officials closed the "great kiva" located at Chaco Culture National Historic Park after Native Pueblos and Navajos complained of desecration by tourists.[125] In the spring of 1996, in Santa Fe, New Mexico, "a regional Forest Service official overturned a local agency decision approving a ski area expansion onto a mountain considered sacred by some Native Americans."[126] At Bandelier National Monument in New Mexico, "park rangers are now keeping secret the location of Lions' Shrine, two volcanic rocks carved into the shape of lions," a shrine sacred to the Cochiti Pueblo, after the shrine was being littered with strange offerings.[127] Finally, the Alliance to Protect Native Americans in National Parks was formed by members of the Timbisha Shoshone tribe in order to stake a claim for their land located in Death Valley National Park. That Alliance has grown with the addition of the Miccosukees of Florida's Everglades National Park, the Hualapais near the Grand Canyon National Park, and the Navajo Nation, with several more tribes currently expressing interest.[128]

The outcome of the *Bear Lodge* suit is being monitored by more than a few interested parties. "William Perry Pendley of the Mountains States Legal Foundation says that if his group wins this case, there could be more lawsuits. Potential plaintiffs are the Santa Fe Ski Area, climbers who were denied access to Cave Rock near Lake Tahoe and tourists wanting to walk under Rainbow Bridge."[129] One area in particular, however, is particularly compelling. Rainbow Bridge, a Navajo sacred site in Utah. One of the things that makes Rainbow Bridge's case so interesting is the less than definitive history behind its sacred status, as well as the fact that "there is no single, organized Indian group pushing for the changes at Rainbow Bridge."[130]

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124. Smith & Manning, *supra* note 6.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* Several stories exist as to the site's sacredness: "One explanation comes from a Hopi story about the "sipapu" — a gateway through which the souls of people come out of the

Located on a national park, Rainbow Bridge, the world's largest stone arch, is being regulated by the NPS. Signs, as well as park rangers, encourage visitors to the park not to walk underneath the bridge, in response to Navajo complaints that tourists were desecrating the sacred site by walking underneath it.[131] Specifically, the signs near the bridge read: "American Indians consider Rainbow Bridge a sacred religious site. Please respect these long-standing beliefs. Please do not approach or walk under Rainbow Bridge."[132] More importantly, in the past few months, the park officials added the word "voluntarily" to these signs.[133] The NPS measures are voluntary in nature, encouraging visitors to refrain from other distracting activities, such as sunbathing, listening to music, and climbing on the rocks. Park Rangers might stop visitors to explain the religious significance of the site, but they cannot forbid visitors from walking under the arch, nor punish them for doing so.

Badoni v. Higginson involved Rainbow Bridge and dealt with the fact that Navajos "'believe if humans alter the Earth in the area of the bridge, [tribal] prayers will not be heard by the gods, and their ceremonies will be ineffective to prevent evil and disease.'"[134] Already, there are rumblings of discontent over the signs at Rainbow Bridge, as well as over the voluntary NPS request of tourists not to walk under the arch — the "Natural Arch and Bridge Society" has already informed the NPS of their displeasure with the measures. Despite these complaints, Superintendent Joe Alston, in charge of maintaining Rainbow Bridge, argues that the voluntary request and the signs are just as valid as those measures undertaken at Bear Lodge:

> Fundamentally, there will always be an inherent conflict between the large number of people coming to Rainbow Bridge and how Native Americans view it. . . . What we're trying to present is the whole story, not just the Anglo side of it, but also the Native American perspective of what this place is and what it means to them.[135]

Alston is trying to balance tribal demands asking for a ban on all non-Indian visitors to the arch with those of the tourists who claim that even a voluntary

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underworld and eventually return to it. The legend goes that the souls of all humans were shut up in the Earth until the animals, learning of the imprisonment, began digging. First Coyote and finally a badger dug a cavelike hole deep enough to release the souls. When the Earth is done with them, the souls must return through the archlike gateway, leading to speculation that natural bridges may represent to American Indians the doorway between life and death."

131. *Id.*

132. *Id.*

133. Smith, *supra* note 72.

134. Smith & Manning, *supra* note 6.

135. *Id.*

request to stay away from the arch is reverse discrimination, forcing them to respect the Native American faith.

Applying the tests proposed by Cross and Winslow to the Rainbow Bridge problem, I would argue that the Park Service measures implemented there are just as constitutional as those upheld by Judge Downes in the most recent *Bear Lodge* decision. The arguments on both sides would likely mirror those in *Bear Lodge* in many respects.

Under the first prong of Professor Cross' test, the Park Service's desire to preserve Native American cultural access is consistent with the duty owed to Native Americans by the federal government under the federal-tribal trust relationship. Given the disagreement over the legends of the arch, there may be some difficulty in establishing the precise nature of the site's sacred qualities. However, it is unquestionable that there are significant sacred qualities to the arch, and there is cultural impact due to the tourists' interference with the sacred site. Bearing in mind that, like *Bear Lodge*, the policies enacted by the Park Service at Rainbow Bridge are voluntary, it seems clear that such actions would survive rational basis scrutiny. Professor Cross' second prong reflects the notion of a statutory duty to preserve Native American cultural resources.

In light of the most recent *Bear Lodge* decision, Winslow's test is a straightforward application of existing Establishment Clause doctrine that appears to produce a constitutional result. Under the *Lemon* test, the secular purposes include accommodation, recreation management, and environmental protection. The voluntary nature of the signs and of the request to refrain from walking under the bridge is just that — voluntary. Those who choose not to respect the Native American sacred site may do so, and are allowed to walk under the bridge without punishment. As such, the measures do not advance religion. They merely make all visitors to the park aware of the religious significance of the bridge to the Navajo people. And finally, excessive government entanglement is not fostered, given that the voluntary request does not require nor allow park rangers to detain or punish those who choose to walk under the bridge. Rather, the measures set up are of an educational nature, allowing each visitor to appraise himself or herself of the entire situation, and then make the conscious decision to either respect or fail to respect the wishes of the Native Americans who hold Rainbow Bridge sacred.

Under Justice Kennedy's coercion test, there is room for an argument that the measures create an environment that coerces visitors to the park to respect the Native American religious beliefs. However, such an argument appears to be weakened again by the voluntary nature of the measures. The addition of "voluntarily" to the signs near the bridge makes it clear that it is still one's own decision whether or not to obey its request. Potential challenges to the Rainbow Bridge measures would likely appear to be most effective under a coercion test argument. Those arguing against the policies might argue that

the signs, coupled with rangers patrolling the park encouraging people to respect the edicts of the signs, does in fact amount to coercion. However, despite what courts might perceive as the somewhat appealing nature of this claim on its face, it is rendered wholly ineffective by the voluntary nature of the requests. Those who backed this coercion argument would be arguing that not a single visitor to the park has neither the ability nor the individuality to make a decision for himself or herself. To do so would insult the intelligence of those visitors, not to mention that of the court before which the case would be argued.

Finally, under Justice O'Connor's endorsement test, there is once again no Establishment Clause problem. The mere presence of signs asking park visitors to voluntarily choose to respect the religious significance of the Bridge to the Navajo people does not reasonably cause those visitors to feel as if the Native Americans are insiders, and the visitors themselves are outsiders. In fact, by allowing visitors the voluntary choice to respect or to not respect the Navajo wishes, the government action indirectly respects the religious preferences of *all* parties involved. By allowing for such individual choice, the government action here has clearly not endorsed any one religion in favor of another.

All eyes will be on the appeal process in *Bear Lodge* to see where the future of Native American sacred site protection law will lead. Based upon the most recent ruling in that case, coupled with the analyses of Professor Cross and Ms. Winslow, it appears that the trend in Native American law is slowly shifting towards affirmatively mandating sacred site protection on federal public lands through rubrics of accommodation and of the federal-tribal trust relationship.

X. Conclusion

> *[W]e are still here and we intend to be here for many generations to come. . . . People in the larger society need to know some of this history so that they will stop trying to resurrect failed policies and learn to accept our permanence as the third kind of sovereign in our federal system.*[136]

This eloquently sums up the need for a more sympathetic view of Native American culture, and for an increased appreciation of what Native Americans, as a people, have endured over the course of our nation's history. It shows that the dominant culture, and in particular that dominant culture's legal system, must take heed of the unique role of the Native American people in our national heritage. Moreover, it highlights the special and sacred

136. Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 150 (1996).

place in which Native Americans place their lands in their respective worldviews. Accordingly, we must seek to defend their ways of life and be simultaneously guided and constrained by the Constitution in doing so. We must be cognizant of the fundamentally conflicting belief and value systems which underscore the Native American and Anglo-American ways of life, respectively. In doing so, we can begin to accord Native American faiths the respect and dignity they deserve, as mandated by the principle of accommodation under the Establishment Clause.

In an even broader sense, our respect of Native American sacred site rights under the Establishment Clause can be channeled into a stronger sense of respect for all lands:

> By focusing some of our attention on the ways that particular tribal cultures relate to the natural world and the ways in which they explain these relationships, we can help people in the larger American society come to a fuller understanding of the relationships between human societies and the natural world. In doing so, we can help them become better practitioners of a concept that non-Indian environmentalists might call "stewardship."[137]

In honoring the Native Americans' sense of the sanctity of the land, only good can come of a policy that stresses such respect and preservation of our entire nation's precious land.

Regardless of one's position on the issue, it is absolutely critical that one honor and respect the dignity and vitality of the Native American faith and heritage. Bob Archibald, a rock climber sympathetic to the Native American argument in *Bear Lodge*, touches upon this necessity: "'How would you like it if someone came into your church while services were going on and threw a party? What this is about is respect."[138] That respect can be said to be owed both to the Native Americans, as well as to the mandates of the federal government's trust relationship with the Native Americans.[139] At the very least, one can be cognizant of the original intent of the Framers in crafting the Establishment Clause, and respect the Native American claims to various tracts of public land. At best, one can fully embrace Justice Brennan's description of Native American faith, weighing it very heavily in considering the rights of Native Americans to sacred site protection on federal public

137. *Id.* at 160.

138. Snyder, *supra* note 56. Incidentally, it appears that the vast majority of climbers at Devil's Tower are respecting the voluntary ban on June climbing, and staying away from the site during that month.

139. Smith & Manning, *supra* note 6. Specifically, regarding the trust relationship, the authors state: "Robert Allan, an attorney for the Navajo Nation's Division of Natural Resources, believes legal precedents for exclusive access to sacred sites can be found in cases involving the federal government's trust responsibility to tribes." *Id.*

lands: "The site-specific nature of Indian religious practices derives from the Native American perception that land is itself a sacred, living being."[140]

140. Lyng v. Northwest Indian Cemetery Protection Ass'n, 485 U.S. 439, 461 (1988) (Brennan, J., dissenting).